Supreme Court, U.S.
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No. 02 - 38

In The

Supreme Court of the United States

T. V. RYAN, ROBERT J. KATCHER, GARY P. STRACK, JULIUS D. MANN, JR., and W. K. McKENZIE,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a rail carrier, consistent with Section 3, First (i) of the Railway Labor Act, 45 U.S.C. §153, First (i), may suddenly and unilaterally reverse the "usual manner of handling" of time claims and grievances, which permitted trainmen to be represented in such handling by the minority union in which they hold membership, on the basis of a long standing, but unused, bargaining agreement provision limiting the processing of grievances to the collective bargaining representative for the craft of trainmen.

PARTIES TO THE PROCEEDINGS

Petitioners

T. V. Ryan, Robert J. Katcher, Gary P. Strack, Julius D. Mann, Jr., and W. K. McKenzie, all of whom are individuals employed by the Union Pacific Railroad Company.

Respondents

Union Pacific Railroad Company, a Delaware corporation and a subsidiary of Union Pacific Corporation, which parent corporation's stock is publicly traded, and the United Transportation Union, which is an unincorporated labor organization.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 11, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 286 F.3d 456 (7th Cir. 2002). A copy of the opinion is included in the Appendix as Appendix A at 1a. The opinion of the district court for the Northern District of Illinois is not yet officially reported, but is published at 2001 WL 845485 (N.D. Ill. 2001) and is included in Appendix B at 9a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on April 11, 2002. No petition for rehearing was filed on behalf of petitioners. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Section 3, First (i) of the Railway Labor Act, 45 U.S.C. §153, First (i):

> The disputes between an employee or group of employees and a carrier or carriers growing out

> of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 31, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute.
>
> (May 20, 1926, c.347, Title I, §3, 44 Stat. 578; June 21, 1934, c.691, §3, 48 Stat. 1189; redesignated Apr. 10, 1936, c.166, 49 Stat. 1189.).

STATEMENT OF THE CASE

The petitioners are five individuals employed as trainmen by the respondent Union Pacific Railroad Company ("UPRR") on its former Chicago & North Western Transportation Company ("C&NW") lines of railroad. They are, and have been for years, members of the Brotherhood of Locomotive Engineers ("BLE"). Pet. App. 1a[1]. However, the United Transportation Union ("UTU") serves as the collective bargaining representative for the craft of trainmen employed by UPRR, and the terms and conditions of employment for trainmen are set forth in collective bargaining agreements negotiated between UTU (or its

[1] Citations to "Pet. App." are to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14.1(i).

predecessor unions) and UPRR (or its predecessor railroad, the C&NW). *Id.*, 10a.

The UPRR/UTU bargaining agreement, in conformity with Section 2, Eleventh (c) of the Railway Labor Act ("RLA"), 45 U.S.C. §152, Eleventh (c), provides that trainmen may comply with their union security obligations by joining another labor union representing operating employees – such as BLE. *Id.*, 11a. *Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480 (1957). On the other hand, the agreement between UPRR and the UTU covering trainmen on the former C&NW in the classifications of conductor and brakeman is dated February 1, 1978, and provides in relevant part that:

> Regular accredited committees of the Order of Railway Conductors shall be recognized in the adjustment of differences which may arise under the agreement.
>
> The exclusive right of the General Committee of the Order of Railway Conductors to represent employees coming within the scope of this agreement is conceded in the making of contracts, rules, rates and working conditions and interpretations thereof.
>
> The right of any conductor to have the regularly constituted committee of his organization represent him in the handling of grievances under the recognized interpretation placed upon the schedule involved by the signatories thereto, is conceded, provided the regularly constituted committee first secures such interpretation in writing.

Notwithstanding this language giving the UTU, or one of its predecessors, the exclusive right to handle

grievances for the craft of trainmen, trainmen members of BLE, petitioners and others like them, have been permitted since at least 1989 to select their own union (BLE) to represent them in "on the property" proceedings on the C&NW property. Pet. App. at 11a. This practice continued without interruption until June 23, 2000, when UPRR unilaterally reversed this longstanding practice. Based upon the 1978 agreement provisions, UPRR announced it would no longer handle time claims and grievances arising under the UTU/UPRR – C&NW agreements, which had been handled or in the future were submitted by BLE on behalf of its trainmen members on the former C&NW. *Id.* Since UPRR made this announcement, petitioners, and other trainmen members of BLE on UPRR-C&NW, have been denied their right to receive "on the property" claims handling assistance from their own union.

On November 30, 2000, petitioners filed their complaint which sought injunctive relief affirming their right to be represented by their own labor union in these "on the property" proceedings prior to arbitration. Specifically, they claimed UPRR's refusal to let them have BLE process their claims violated the RLA because UPRR's position was contrary to the "usual practice and manner" with respect to handling of such claims on UPRR-C&NW, and that the provisions themselves of the 1978 UPRR-C&NW and UTU agreement, which prohibited petitioners from being represented by their union (BLE) in these on-property claims proceedings, were contrary to the "usual practice and manner" of handling such claims, and therefore unlawfully deprived petitioners of their rights under the RLA. *Id.*, 12a. UTU was joined as a necessary defendant pursuant to Fed. R. Civ. P. 19. *Id.*

On February 27, 2001, UPRR moved to dismiss the complaint for lack of subject-matter jurisdiction and failure to state a claim for which relief can be granted. *Id.*, 13a. By memorandum opinion and order, dated July 24, 2001, the district court granted the railroad's motion to dismiss under Fed. R. Civ. P. 12(b)(1). *Id.*, at 23a-24a. In ruling upon the merits of the employees' causes of action, the district court found that it "would be called on to interpret the UTU-UP Agreement." *Id.*, at 18a. Because interpretations of agreements fall within the exclusive jurisdiction of the National Railroad Adjustment Board, the trial court concluded that it lacked jurisdiction over the complaint and dismissed the suit for lack of subject-matter jurisdiction. An appeal was then taken to the United States Court of Appeals for the Seventh Circuit.

The appellate court held that the "usual manner," as it interpreted Section 3, First (i) of the RLA, is determined solely by the language (or absence of it) in the collective bargaining agreement. *Id.*, 5a. Therefore, in the judgment of the Seventh Circuit, where the agreement does not provide a trainman who belongs to the BLE a choice between a BLE griever and a UTU griever, the trainmen belonging to BLE cannot claim that the RLA supersedes the unilateral switch by UPRR and UTU from free choice of representation to exclusive representation in grievance handling by UTU. Accordingly, in the view below, the complaint failed to state a claim on the merits and should have been dismissed on that basis.

The Seventh Circuit simply wrote right over the issue. It said:

> Should it make a difference that the railroad and the UTU did not enforce the exclusivity provision

> for some years after it was inserted into their collective bargaining agreement? We cannot see why.

Id. The district court properly viewed the issue as to what is the "usual manner" to be a fact-based issue. It perceived, however, that determination was to be one for an arbitrator, not a question of contractual validity to be decided by the court. On the other hand, the appeals court started and stopped the process with the provision in the labor contract. The Seventh Circuit agreed the issue was one of contractual validity, and proceeded to conclude that the "usual manner" is solely determined by the text of the collective bargaining agreement and not the governing practice.

REASONS FOR GRANTING THE WRIT

This Court has long recognized that the RLA permits individual employees under its coverage an effective voice and participation in the processing of their claims and grievances. In this connection, the Court said that the RLA does not "submerge wholly the individual and minority interests, with all power to act concerning them in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation." *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 at 733-34 (1945) (footnote omitted), *decision adhered to*, 326 U.S. 801 (1946). In so finding, the Court found that Sections 2, Fourth and 3, First (j), 45 U.S.C. §§152, Fourth, §153, First (j), expressly preclude any other construction of the Act. Section 2, Fourth permits the employee to confer individually with rail management.

Section 3, First (j) mandates that the individual employee be notified as to any arbitration hearing and allows him to appear "in person, by counsel, or by other representatives" that he or she selects. *Id.* at 734.

Subsequently, in *Landers v. National Railroad Passenger Corp.*, 485 U.S. 652 at 657 n.4 (1988), the Court, addressing Section 3, First (i) of the RLA, held that "an [operating] employee may be entitled to be heard through the representative of his choice at company-level grievance and disciplinary proceedings if that has become *the 'usual manner' of handling disputes at his workplace.*"[2] (Emphasis added). The case at bar is the first purporting to interpret and apply the term "usual manner," as used by this Court in *Landers, supra*, in a factual context involving the same unions and operating employees.

In this case, the Court of Appeals defined the "usual manner" of handling to be a strict standard set forth in the collective bargaining agreement, which is in direct contravention of this Court's decision in *Landers v. National Railroad Passenger Corp., supra*. Moreover, the "usual manner," by its very nature, is a fact oriented standard. The Seventh Circuit's holding is a measure undertaken to avoid the use of any forum – federal courts or arbitration – to resolve the disputes arising between the members of the two organizations and the railroads as to the scope of their union's representational authority under the RLA and thereby severely limits the individual operating employee's freedom of association or union representation. The holding

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[2] The term "operating employee" refers to employees who operate trains, *i.e.*, the crafts of engineers, conductors, brakemen and yardmen represented either by BLE or UTU.

below effectively deletes the "usual manner" of handling from Section 3, First (i). By restricting the way "usual manner" has been followed and applied by the nation's railroads and the involved unions over 75 years, the decision below distorts the entire scheme of the RLA, which fostered employee choice in the railroad operating crafts. In fact, contrary to the view expressed in the opinion below, the deletion of "usual manner" for handling grievances of operating employees will have a chilling effect upon the right of those employees to select their union for membership and to handle their claims or grievances. The BLE trainman member has no assurance that UTU will represent him as well as it does its dues paying members, because it does not receive dues from the BLE member; nor is the BLE trainman member guaranteed that UTU will not demand a fee or service charge for performing such services. *See, e.g., Corzine v. Brotherhood of Locomotive Engineers*, 147 F.3d 651 (7th Cir. 1998); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228 (1st Cir. 1996); *Dempsey v Atchison, Topeka and Santa Fe Ry. Co.*, 16 F.3d 832 (7th Cir. 1994), *cert. denied*, 513 U.S. 821 (1994).

If any change in Section 3, First (i) is made to limit "usual manner" solely to the dictates of the labor contract, it should be made by Congress, not the Seventh Circuit. Moreover, the need for judicial guidance from this Court in this case is critical in that these fratricidal disputes between the UTU and BLE and the employees they represent are increasing in number and become more likely to be disruptive to employee morale and uninterrupted rail freight service in interstate and foreign commerce. Accordingly, the question is one of national

importance and, we submit, should be definitively decided through this case.

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION RELYING EXCLUSIVELY UPON THE TERMS OF THE BARGAINING AGREEMENT AND THIS COURT'S DECISION IN *LANDERS v. NATIONAL RAILROAD PASSENGER CORPORATION.*

Petitioners' claims originate in the language of Section 3, First (i) of the RLA, which establishes a statutory framework for the handling of claims and grievances, using railroad jargon, "on the property." They alleged that on UPRR's C&NW lines, longstanding history establishes that the "usual manner" of handling claims of trainmen "on the property" extended BLE trainmen members the right to choose their own union to represent them in the claims handling process. They complained because UPRR unilaterally abrogated this prior practice on the basis of bargaining agreement provisions which had never been enforced. In addition, the petitioning trainmen claim that, to the extent the UTU/UP-C&NW agreements deny them the right to be represented by BLE, those agreements are contrary to the "usual manner" of handling claims and grievances "on the property" and therefore must be invalidated under the RLA.

This Court expressly recognized the validity of that analysis in *Landers v. National Railroad Passenger Corp.*, 485 U.S. 652 (1988). Addressing Section 3, First (i) of the RLA, the Court held that "an [operating] employee may be entitled to be heard through the representative of his

choice at company-level grievance and disciplinary proceedings if that has become the 'usual manner' of handling disputes at his workplace." *Id.* at 657 n.4. In so holding, the Court rejected an across-the-board right for minority union representation in grievance proceedings, but adhered to the literal words of Section 3, First (i) in marking the boundaries of the statutory entitlement. Petitioners' claims fit squarely within the parameters specified by the Court; they assert a right grounded in the language of the statute, which right is eliminated altogether under the decision of the Seventh Circuit.

In totally rejecting this analysis and conclusion, the Seventh Circuit advanced the view that there can be no minority representation in grievance handling if the language contained in the labor contract does not provide for such representation, even though the "usual manner" or "practice," in fact, permitted the grievant to be represented by any person, including a minority union. That conclusion contravenes not only the holding in *Landers*, but also its history.

The *Landers* litigation arose from a suit by a locomotive engineer employed by the newly-formed National Railroad Passenger Corporation (commonly known as "Amtrak"). Although the terms and conditions of his employment were governed by a collective bargaining agreement between Amtrak and the engineers' union, *Landers* maintained membership in UTU – the trainmen's union – and requested that UTU represent him in grieving a disciplinary suspension. Amtrak denied his demand "on the ground that the collective-bargaining agreement provided that only BLE could represent engineers at company-level hearings." *Id.* at 651. Landers sued on the ground that the agreement impermissibly extinguished his

right under the RLA to be represented by the union of his choice.

Following a bench trial, the district court dismissed Landers' claim. The First Circuit affirmed, both on the finding that the agreement prohibited an employee's representation by the union of his choice in an on-property investigatory hearing and on the trial court's holding that neither the RLA nor the facts as to the "usual manner" gave Landers an unlimited right to representation at the hearing by a union other than BLE. *Landers v. National Railroad Passenger Corp.*, 814 F.2d 41 (1st Cir. 1987).

With regard to the district court's interpretation of Section 3, First (i), the First Circuit, unlike the Court below, agreed that (*id.*, at 46):

> The phrase "usual manner" calls for no unusual mental gymnastics in matters of lexicography. Read naturally and in context, it refers unreservedly to the customary way ("usual manner") in which disputes have been resolved by a given railroad and its workforce. . . . The most plausible reading of this clause – the only reading which adequately explains its precise language and its juxtaposition with other statutory provisions – is that it adjusts itself, carrier-by-carrier, to fit the idiosyncratic contours of each and every line. The presence (or absence) of the opportunity to be represented by a minority union is one of these flexible adjustments.

Agreeing with the district court's "fact-based determination that the 'usual manner' prevalent at this workplace" – on this newly-constituted carrier – "did not involve representation by a union other than the . . . collective bargaining agent," the First Circuit upheld the

dismissal of Landers' claim on the merits on the ground that "unless and until the Agreement or the 'usual manner' is changed, [Landers] and others similarly situated must forego representation by their own (minority) union at the initial stages of grievance and disciplinary proceedings." *Id.*, 49.

The First Circuit's "natural," common-sense reading of Section 3, First (i) confers on operating employees a statutory right to be represented "by their own (minority union) at the initial stages of grievance and disciplinary proceedings," *id.* – and consequently forbids agreements prohibiting such representation – when, but only when, the evidence of record establishes that a practice of employee choice of representatives has become "the usual manner at [the employee's] workplace" in the handling of claims. *Id.*

This Court's affirmance of this construction of Section 3, First (i), *Landers*, *supra*, 485 U.S. at 657 n.4, makes clear that where an employee can make a factual showing of the existence of a customary practice permitting trainmen to be represented by their own union in "on the property" proceedings, the railroad's repudiation of that "usual manner" of handling claims in reliance upon an unused agreement, overridden by the practice of handling adopted by the parties, violates the RLA. In light of the manner in which the case proceeded below, the facts that the practice existed and that the practice was changed by UPRR were conceded by respondents. *See, e.g. Transit Exp. Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001) (well pleaded factual allegations are accepted as true). The "usual manner" is fact driven and the language of the agreement is not in itself determinative of the customary handling on the railroad. Accordingly, the case should have

been remanded to the district court to determine the validity of the agreement under those circumstances.[3]

The Railway Labor Act is a statute of major importance to railroads and railroad workers alike, and the issue arising in this case and others applies to all railroad operating employees and can arise on all of the railroads throughout the United States. This Court should act now to remove the uncertainty created by the decision below and to eliminate the injustice created by that decision in considering the "usual manner" to be restricted to the language of the bargaining agreement. The decision of the Seventh Circuit deprives railroad operating employees of the freedoms given all other railroad workers in the Act with respect to their claims and grievances and invites conflicts between those employees and the two unions representing the operating employees in the railroad industry.

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[3] The validity of these agreements under Section 3, First (i) are for the district courts in the first instance. *Landers v. National Railroad Passenger Corp.*, 485 U.S. 652, 657 n.4 (1988); *see also*, *Felter v. Southern Pac. Co.*, 359 U.S. 326 (1959); (invalidating provision of bargaining agreement as violation of employee's rights under Section 2, Eleventh (b), 45 U.S.C. §152, Eleventh (b)); *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945) (invalidating provision of collective bargaining agreement that violated employee's right under Section 3, First (j), 45 U.S.C. §153, First (j), to settle own grievances and to present them to the National Railroad Adjustment Board).

II. THE COURT SHOULD GRANT REVIEW BECAUSE THERE IS NO MORE IMPORTANT QUESTION WITH RESPECT TO RAILROAD LABOR RELATIONS CURRENTLY BEFORE THE COURTS THAN PRESENTED BY THIS CASE.

This case presents a question of basic importance in the administration of the grievance-arbitration process codified in the Railway Labor Act. The question covers the more than 63,000 operating service employees on the nation's major railroads, who represent forty percent of all railroad workers, the two unions representing these employees and those railroads. The question is whether a railroad may upset stability in labor relations with respect to contract administration by unilaterally abrogating the "usual manner" of handling grievances and claims on property on the basis of a never used agreement provision. If this question was not answered by this Court in *Landers* – and petitioners respectfully contend it was – then it surely should be decided now.

Not only is the "usual manner" of handling, one that is fact-based, consistent with the language set forth in Section 3, First (i), but it most clearly advances the purposes of the RLA "to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization," and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay rules, or working conditions." *See* 45 U.S.C. §151a(2) and (5). It also furthers the provision of Section 2, Fourth of the RLA, 45 U.S.C. §152, Fourth, which permits "an employee, individually, or local

representatives of employees [to] confer[] with management during working hours. . . . "

Given the jurisdictional rivalries among the membership of the two operating unions, the decision below operates to frustrate every major purpose for which Congress enacted the amended RLA. Definitely, it will deprive the individual operating employee of his or her right to control the handling and settlement of the employee's claims and grievances. Although the majority union's interpretation and application of the agreements for the craft must be followed, the operating employee has, under the "usual manner" of handling on freight railroads, the right to process the claims himself or by his minority union.

Already, additional litigation is pending on the issue in *United Transportation Union v. CSX Transportation, Inc. and Brotherhood of Locomotive Engineers*, U.S. District Court for the Middle District of Florida, Case No. 3:01-CV-240-J-21HTS, and *United Transportation Union v. Burlington Northern and Santa Fe Ry. Co. and Brotherhood of Locomotive Engineers*, U.S. District Court for the Central District of California, Case No. SACV 01-242 GLT. Additional litigation can be expected in the future on other major railroads.

Thus, the Court should address this issue under the RLA, not only to redress the clear injustice of the judgment below, but also to resolve a legal issue, which left unanswered, could lead to instability of railroad labor relations and operations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 01-3204

T.V. RYAN, *et al.*,

Plainitffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY and
UNITED TRANSPORTATION UNION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 7549 – **Ronald A. Guzman**, *Judge*.

ARGUED FEBRUARY 25, 2002 – DECIDED APRIL 11, 2002

Before POSNER, EASTERBROOK, and WILLIAMS, *Circuit Judges*.

POSNER, *Circuit Judge*. Five members of the Brotherhood of Locomotive Engineers who are employed by the Union Pacific Railroad as trainmen brought suit against the Union Pacific and the trainmen's union, United Transportation Union. They sought a declaration that they are entitled to be represented in grievance proceedings by their union, the BLE, rather than by the UTU, even though the collective bargaining agreement between the Union Pacific and the UTU appoints the latter as the

trainmen's exclusive representative in grievance proceedings. The district court dismissed the suit for want of subject-matter jurisdiction.

The Railway Labor Act establishes a system of compulsory arbitration of disputes arising out of collective bargaining agreements in the railroad industry. The first stage of dispute resolution consists of grievance proceedings "on the property," that is, within the railroad itself, before committees composed of union and management representatives. 45 U.S.C. § 153 First (i); *International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 688-89 (1963); *Kulavic v. Chicago & Illinois Midland Ry.*, 1 F.3d 507, 515 (7th Cir. 1993). If the dispute cannot be resolved at this level, the case proceeds to formal arbitration, either before a Public Law Board or a National Adjustment Board, but it is only the first stage that concerns us here. The Act provides that at this stage the dispute "shall be handled in the usual manner." 45 U.S.C. § 153 First (i). The meaning of the quoted language is the only issue in this appeal.

We need to paint in some background. It used to be that engineers were represented by the BLE and other railroad workers (collectively, trainmen) by the UTU. But as the industry shrank, jobs were consolidated and engineers often found themselves working as trainmen, and vice versa. Nevertheless the unions did not merge. Instead workers were allowed to elect which union to join. So even though the BLE was the engineers' union and the UTU the trainmen's union, an engineer assigned as a trainman could continue to belong to the BLE; and by virtue of a 1951 amendment to the Act, he didn't have to pay dues to the UTU even though the UTU was his collective bargaining representative while he was doing trainman's work.

And likewise a trainman assigned as an engineer could continue to belong to the UTU and did not have to pay dues to the BLE. *Landers v. National R.R. Passenger Corp.*, 485 U.S. 652, 657-58 (1988); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 489-92 (1957); *Corzine v. Brotherhood of Locomotive Engineers*, 147 F.3d 651, 653-54 (7th Cir. 1998); *Brotherhood of Locomotive Engineers v. Kansas City Southern Ry.*, 26 F.3d 787, 790 (8th Cir. 1994). This structure remains in effect, and so both unions have collective bargaining agreements with the Union Pacific.

A provision added to the UTU's collective bargaining agreement with the Union Pacific in 1978 designated that union the *exclusive* representative of all Union Pacific trainmen in grievance proceedings "on the property" even though some of these trainmen, such as our five plaintiffs, belong to the BLE. We do not know whether the BLE's collective bargaining agreement with the railroad contains a parallel provision with respect to engineers who may happen to belong to the UTU.

Despite the exclusivity provision, there were occasions between 1989 and 2000 on which, apparently without objection by the UTU or the railroad, the BLE was permitted to represent its trainmen members in the first-stage ("on the property") grievance proceedings against the railroad. But in the latter year the UTU announced that this would no longer be permitted – that it was standing on the terms of the collective bargaining agreement. That announcement precipitated this suit, in which the plaintiffs argue that their representation by the BLE is "the usual manner" in which first-stage grievances are handled and so cannot be changed by the UTU and the railroad.

The most natural and sensible reading of the statutory term "in the usual manner" contrasts it with the provision governing the second, the arbitral, stage of resolving disputes over the meaning or interpretation of the collective bargaining agreement. The procedures for that stage are set forth in the statute; the anterior proceeding, the proceeding on the property, is to be conducted in the usual manner, that is, in the manner agreed upon by the railroad and the union. *That* stage is for them to design as well as to administer. So read, in accordance with such decisions as *Pawlowski v. Northeast Illinois Regional Commuter R.R.*, 186 F.3d 997, 1000 (7th Cir. 1999); *Kulavic v. Chicago & Illinois Midland Ry., supra,* 1 F.3d at 515, and *Landers v. National R.R. Passenger Corp.*, 814 F.2d 41, 46-47 (1st Cir. 1987), aff'd, 485 U.S. 652 (1988), the "usual manner" provision allows the railroad and the union to prescribe *in the collective bargaining agreement* the manner in which grievance proceedings shall be conducted on the property, as the Union Pacific and the UTU did in 1978. For in a unionized workplace it is in the collective bargaining agreement that one finds the provisions creating the grievance procedures.

The plaintiffs argue that "usual manner" should be read to grandfather any practice that has emerged in the conduct of grievance proceedings on the property. If between 1989 and 2000 it was usual to give a trainman who belonged to the BLE a choice between a BLE griever and a UTU griever, that practice is now cemented in and can never be changed. No reason is given for such a weird result, which would give an arbitrary subset of the railroad's employees a choice between two unions' grievers – and could the employee insist on both? (At argument the plaintiffs' lawyer was reluctant to commit himself on that

question.) Even the benefit to the BLE is obscure, since the handling of its trainman members' grievances by the UTU is at the UTU's expense. But probably the BLE is worried that members pleased with the UTU's handling of their grievances might be minded to jump ship and join the UTU.

The plaintiffs rest their argument on a Supreme Court footnote that reads in its entirety as follows: "Of course, an employee may be entitled to be heard through the representative of his choice at company-level grievance and disciplinary proceedings if that has become the 'usual manner' of handling disputes at his workplace." *Landers v. National R.R. Passenger Corp.*, 485 U.S. 652, 657 n. 4 (1988). That just repeats what the statute says; it does not tell us how to decide what is the "usual manner." The issue in *Landers* was whether the Railway Labor Act entitled a member of a railroad union that was *not* the member's bargaining representative nevertheless to represent him in grievance proceedings on the property, and the Court held that there was no such statutory right. This is entirely consistent with the proposition, nowhere questioned in the opinion, that a collective bargaining agreement designating a railroad union as the exclusive representative in grievance proceedings takes precedence over an informal custom inconsistent with that designation. The decision the Supreme Court was affirming had asserted that very proposition: "Where, as here, a collective bargaining agreement is in place, representation rights must be based upon, and may be limited by, that pact." 814 F.2d at 47.

We did, it is true, many years ago flirt with the position urged by the plaintiffs here. See *McElroy v. Terminal R.R. Ass'n*, 392 F.2d 966, 971 (7th Cir. 1968).

That decision long predated both the First Circuit's decision in *Landers* and the Supreme Court's decision in that case. And in *Pawlowski v. Northeast Illinois Regional Commuter R.R., supra,* 186 F.3d at 1101 n. 4, we remarked that "the continued validity of the precise holding of *McElroy* is in doubt after the Supreme Court's decision in *Landers*." That is an understatement; the holding cannot survive *Landers*.

Should it make a difference that the railroad and the UTU did not enforce the exclusivity provision for some years after it was inserted into their collective bargaining agreement? We cannot see why. The failure to enforce a contractual term does not abrogate the term unless the conditions for a waiver or estoppel are established, and the plaintiffs have made no effort to do that. Anyway they are not arguing that the agreement was modified or that it should be interpreted to authorize a practice that had become customary though it was contrary to the language of the agreement; they can't argue that to us, as we're about to see.

It remains only to decide whether the district judge was right to dismiss the suit on jurisdictional grounds rather than on the merits. His reasoning was that since the plaintiffs have no statutory ground for using BLE grievers, they *must* be seeking an interpretation of the collective bargaining agreement as permitting them to use those grievers. Not so. They may be, in fact they are, suing for a declaration that the statute overrides the agreement and entitles them to use BLE grievers. Their interpretation of the statute is wrong; the statute confers no such right on them. But that conclusion is a determination of the merits of their claim. It has nothing to do with jurisdiction. The federal courts have jurisdiction to interpret

the Railway Labor Act, *Pawlowski v. Northeast Illinois Regional Commuter R.R., supra,* 186 F.3d at 1000 n. 1; *Taylor v. Missouri Pacific R.R.,* 794 F.2d 1082, 1085 (5th Cir. 1986), abrogated on other grounds by *Landers v. National R.R. Passenger Corp.,* 485 U.S. 652 (1988); they lack jurisdiction only to interpret collective bargaining agreements made under the authority of the Act. *Pawlowski v. Northeast Illinois Regional Commuter R.R., supra,* 186 F.3d at 1000 n. 1; *Roberts v. Lehigh & New England Ry.,* 323 F.2d 219, 222 (3d Cir. 1963). It was not, to repeat, an interpretation of the collective bargaining agreement, but an interpretation of the Railway Labor Act, that these plaintiffs were seeking from the district court.

We add for completeness that if there were no collective bargaining agreement in force, or no provision in the agreement relating to grievance proceedings on the property, the plaintiffs would be free to argue to the district court that the "usual manner" of handling such grievances was whatever practice the parties had followed. Or if the plaintiffs thought the collective bargaining agreement properly interpreted made that practice the "usual manner," they could argue that in the arbitral process. What they cannot do is appeal to the statute to supersede the "usual manner" as determined by the collective bargaining agreement.

The judgment of the district court is modified to place decision on the merits, and as thus modified is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

T.V. RYAN, ROBERT J. KATCHER, GARY P. STRACK, JULIUS D. MANN, JR., and W.K. McKENZIE, Plaintiffs, v. UNION PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION, Defendants.	No. 00 C 7549 Judge Ronald A. Guzman
UNITED TRANSPORTATION UNION, Cross-Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Cross-Defendant.	

MEMORANDUM OPINION AND ORDER

This matter is now before the Court on defendant Union Pacific Railroad Company's ("UP") motion to dismiss pursuant to Fed. R. Civ. P. ("Rule") 12(b)(1) and 12(b)(6). Plaintiffs brought suit against the defendants alleging that the Schedule Rules and Agreement ("UTU-UP Agreement") in place between the defendants violated

the Railway Labor Act ("RLA"). Cross-plaintiff filed a cross-claim against cross-defendant UP alleging that UP did not follow the UTU-UP Agreement and that the UTU-UP Agreement violated the RLA. For the reasons stated below, the Court grants UP's motion to dismiss and hereby terminates this case.

FACTS

Plaintiffs are five individuals employed as trainmen by UP. (*Compl.* ¶¶ 17-21.) Plaintiffs are all members of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, UP, former C&NW ("BLE"). (*Id.*) BLE is a labor organization and unincorporated association. (*Id.* ¶ 11.) BLE is affiliated with the Brotherhood of Locomotive Engineers, AFL-CIO, an international labor organization representing locomotive engineers. (*Id.*) UP is a "carrier" within the meaning of § 1, First of the RLA, and its activities are subject to the RLA. (*Id.* ¶ 6). On or about May 1, 1995, UP acquired the Chicago & North Western Transportation Company ("C&NW"), another railroad. (*Id.* ¶ 7.) Prior to its acquisition by UP, C&NW was a "carrier" within the meaning of the RLA. (*Id.* ¶ 8.) Defendant and cross-plaintiff United Transportation Union ("UTU") is a labor organization and unincorporated association representing different crafts of railroad employees. (*Id.* ¶ 9; *Def. UTU's Answer* ¶ 9.) UTU has entered into collective bargaining agreements (known within the railroad industry as "Schedule Rules and Agreements") with UP or its predecessor companies on behalf of trainmen employed on the former C&NW property. (*Compl.* ¶ 9; *Def. UTU's Answer* ¶ 9.)

Since at least 1978, each of the UTU-UP Agreements has contained a provision for UTU's representation of trainmen employed on the C&NW property in the filing of claims and grievances under the UTU-UP Agreement. (*Compl.* ¶ 10; *Def. UTU's Answer* ¶ 10.) Trainmen may satisfy the requirement under the RLA that they maintain membership in a labor organization by becoming and remaining members of the BLE. (*Compl.* ¶ 12; *Def. UTU's Answer* ¶ 12.) Beginning in at least May 1989, and continuing thereafter, BLE has filed claims and grievances on behalf of trainmen employed on the C&NW property whenever a trainman requests that BLE represent him. (*Compl.* ¶ 14.) Before and after the acquisition of C&NW by UP, this practice continued without interruption until June 23, 2000, when "UP announced that BLE would no longer be allowed to handle time claims and grievances arising under the UTU-UP Agreement. (*Id.* ¶¶ 15-16.) At the same time that UP announced that the UTU-UP Agreement in place did not allow BLE to represent trainmen in the handling of time claims and grievances, it announced that BLE could continue to represent trainmen in disciplinary matters. (*Cross Pl. UTU's Cross-cl.* ¶ 5.)

From January to April 2000, plaintiffs submitted various claims for pay arising out of the UTU-UP Agreement. (*Pls.' Compl.* ¶¶ 22, 27, 32, 37, 42.) Each of the plaintiffs requested that BLE represent him in the processing of his claim. (*Id.* ¶¶ 23, 28, 33, 38, 43.) Each of plaintiffs' claims was denied. (*Id.* ¶¶ 24, 29, 34, 39, 44.) On behalf of each of the plaintiffs, BLE filed a timely appeal from UP's denial of the plaintiffs' claims pursuant to the grievance handling provision contained in the UTU-UP Agreement. (*Id.* ¶¶ 25, 30, 35, 40, 45.) UP ultimately rejected each of the plaintiffs' appeals stating that BLE

was not the certified bargaining representative of the plaintiffs and that BLE could not progress claims or grievances under the UTU-UP Agreement because only UTU officers could progress such matters. (*Id.* ¶¶ 26, 31, 36, 41, 46.)

Plaintiffs do not challenge the interpretation of the UTU-UP Agreement provisions forbidding claims from being handled by any representative other than UTU. (*Pls.' Mem. Opp. Mot. Dismiss Compl. ("Pls.' Mem.")* at 4-5.) Instead, plaintiffs allege that the RLA provides a statutory guarantee that disputes handled at the company level will be handled according to the customary practice of the parties and that any agreement entered into by a carrier which abrogates that customary practice is unlawful because it violates § 3, First (i) of the RLA. (*Id.* at 8.) Plaintiffs contend that the eleven-year practice of allowing BLE to represent trainmen at company-level proceedings has become the "usual manner" of handling those claims and that the provisions of the UTU-UP Agreement abrogating that process are unlawful because they are in violation of the RLA. (*Id.* at 4, 8.) Plaintiffs filed their complaint on November 30, 2000, asking this Court to declare their right to have BLE represent them in the handling of grievances and claims at the company level and to declare the exclusive representation provisions contained in the UTU-UP Agreement invalid because they violate the RLA. (*Compl.* ¶¶ 11-12.)

UTU was joined in the plaintiffs' action as an indispensable party pursuant to Rule 19. (*Id.* ¶ 9.) UTU answered the complaint on January 26, 2001, and filed a cross-claim against UP alleging that allowing BLE to represent trainmen for *disciplinary* proceedings is not the "usual manner" of handling such disputes. (*Cross-pl.'s*

Cross-cl. ¶ 4.) UTU also challenges the authority of UP to interpret the UTU-UP Agreement. (*Id.* ¶ 8.) Finally, UTU alleges that UP violated the UTU-UP Agreement by allowing BLE representatives to progress employees' claims at the company level. (*Id.* ¶ 9.)

DISCUSSION

UP brings this motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) arguing that this Court does not have jurisdiction over the plaintiffs' and cross-plaintiff's claims and arguing that they have failed to state a claim for which relief can be granted. Rule 12(b)(1) permits a court to dismiss an action for lack of jurisdiction over the subject matter. On a Rule 12(b)(1) motion, the party invoking the court's jurisdiction bears the burden of persuading the court that subject matter jurisdiction exists. *See Cedars-Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1583 (Fed. Cir. 1993). If a Rule 12(b)(1) challenges a court's subject matter jurisdiction based on the sufficiency of the pleading's allegations (a "facial" attack on the pleading), then those allegations are construed in the light most favorable to the non-moving party. *See id.* UP's motion attacks the sufficiency of the plaintiffs' and cross-plaintiff's pleadings, and therefore the plaintiffs' and cross-plaintiff's allegations will be construed in the light most favorable to them.

Plaintiffs' claim and cross-plaintiff's cross-claim arise out of the handling of railway employees' time claims. The RLA provides that disagreements over the interpretation and application of the agreement shall be handled rather informally on the company property (at the "company level"). § 3, First (i) of the RLA provides that these company level disputes shall be handled in the "usual manner."

If the parties cannot resolve a dispute at the company level, the RLA allows the parties to appeal the dispute to an adjustment board. UP argues that the "usual manner" of handling company-level grievances is the procedure which is established by the UTU-UP Agreement. (*Def. UP's Reply Mem.* at 4.) UP concludes from this that the plaintiffs and cross-plaintiff have failed to state a claim under Rule 12(b)(6), but, as will be explained below, this conclusion goes to the jurisdiction of this Court.

Plaintiffs attempt to state a claim under § 3, First (i) of the RLA relying on the Supreme Court's dicta in *Landers v. National Railroad Passengers Corp.*, 485 U.S. 652, 657 n.4 (1988). In *Landers*, the Supreme Court decided that § 2, Eleventh (c) of the RLA did not give an employee the right to be represented by a minority union at company-level grievance and disciplinary hearings. *Id.* at 657. In so holding, the Supreme Court noted that "an employee may be entitled to be heard through the representative of his choice at company-level grievance and disciplinary proceedings if that has become the 'usual manner' of handling disputes at his workplace." *Id.* at 657 n.4. The Supreme Court was referring to § 3, First (i) of the RLA, which provides that "disputes between an employee . . . and a carrier . . . growing out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . ."

Relying on this dicta, plaintiffs argue that § 3, First (i) of the RLA guarantees their right to be represented by their minority union at company-level grievance and disciplinary proceedings if minority-union representation

is the "usual manner" of handling company-level proceedings. (*Compl.* ¶ 53.) Cross-plaintiff argues that allowing BLE to represent employees at company-level disciplinary proceedings is not the "usual manner" for handling those hearings and therefore violates § 3, First (i) of the RLA. (*Cross-pl.'s Cross-cl.* ¶ 4.) Plaintiffs argue that the eleven-year practice of allowing the minority union to represent employees at company-level grievance and disciplinary proceedings has become the "usual manner" of handling those claims and that the exclusive representation provision in the UTU-UP Agreement is invalid under § 3, First (i) of the RLA because it does not allow employees to be represented by their minority union in the "usual manner." (*Compl.* ¶ 53.) Plaintiffs urge that this Court has jurisdiction over their claims arguing that their claims do not require the interpretation of the UTU-UP Agreement, but rather a determination by this Court of whether the UTU-UP Agreement is invalid because it violates the RLA. (*Pls.' Mem.* at 9.)

While the Supreme Court did recognize that a railway employee may be entitled under the RLA to minority-union representation at the company level if minority-union representation is the "usual manner" of handling company-level proceedings, it did not address how a court should determine what the "usual manner" of handling company-level disputes is. *See Landers*, 485 U.S. at 657 n.4. Nor did the Supreme Court address whether a federal court would have jurisdiction over an employee's claim that the "usual manner" of resolving a dispute was not followed. There are several Seventh Circuit cases decided before and after *Landers* that shed light on these questions and will guide this Court's decision.

In *Edwards v. St. Louis-San Francisco Railroad Co.*, 361 F.2d 946 (7th Cir. 1966), a railway employee alleged that the court had jurisdiction to review a decision of the National Railroad Adjustment Board because he was denied due process during a company-level disciplinary proceeding. *Id.* at 953-54. The Seventh Circuit held that it did not have the authority to review the National Railroad Adjustment Board's decision noting that "federal courts are not the guarantors of any rights of either labor or management" at company-level proceedings. *Id.* at 954-55. The Seventh Circuit further held that at the company level "the dispute is between private parties and the applicable procedure for settling the dispute is governed by the [agreement] between them" and not by the RLA. *Id.* at 954. "Therefore, when a railroad employee questions the propriety of the initial hearing held on carrier property, his claim must be based on the provisions of the [agreement] relating to that subject." *Id.* Therefore, according to the *Edwards* court, the guarantee contained in § 3, First (i) of the RLA that minor disputes "shall be handled in the usual manner" is a guarantee that the dispute shall be handled according to the terms of the agreement in place between the carrier and the union.[1]

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[1] There is support for this interpretation of the "usual manner" in the legislative history of the RLA. There is evidence that the "usual manner" was meant to refer to the procedures that a carrier had created for resolving company-level disputes. *See Railroad Labor Disputes: Hearings Before the Comm. on Interstate and Foreign Commerce*, 69th Cong. 67-68 (1926) (statement of Donald R. Richberg, Counsel for the Organized Railway Employees). If the "usual manner" referred to the procedure that a carrier had designated, it follows that where there is an agreement in place between the carrier and the union, the procedure established by the agreement would be the "usual manner" of handling such claims.

This holding was reaffirmed by the Seventh Circuit in *Kulavic v. Chicago & Illinois Midland Railway Co.*, 1 F.3d 507, 515 (7th Cir. 1993), and again in *Pawlowski v. Northeast Illinois Regional Commuter Railroad Corp.*, 186 F.3d 997, 1000 (7th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000). Referring to § 3, First (i) of the RLA, the *Pawlowski* court noted that "[t]he 'usual manner' has been interpreted to mean that minor disputes are handled at the company level *according to the procedures established by the railroad and the union through the [agreement] rather than by the RLA.*" *Pawlowski*, 186 F.3d at 1000 (emphasis added) (citing *Kulavic v. Chicago & Ill. Midland Ry. Co.*, 1 F.3d 507, 513 (7th Cir. 1993); *Landers v. Nat'l R.R. Passenger Corp.*, 814 F.2d 41, 44 (1st Cir. 1987), *aff'd*, 485 U.S. 652 (1988); *Edwards v. St. Louis-San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966); *Broady v. Ill. Cent. R.R. Co.*, 191 F.2d 73, 77 (7th Cir. 1951)); *see also Pawlowski v. Northeast Ill. Reg.'l Commuter R.R. Corp.*, 31 F. Supp. 2d 1051, 1053 (N.D. Ill. 1998) (dismissing a railway employee's claim for lack of jurisdiction because the claim depended on an interpretation of the agreement).

The plaintiffs' and cross-plaintiff's claim that the "usual manner" of handling company-level grievance proceedings has not been followed necessarily requires an interpretation of the UTU-UP Agreement because, as explained above, the "usual manner" of handling those proceedings is governed by the related provisions in the UTU-UP Agreement. A dispute arising or growing out of the interpretation or application of an existing agreement is "subject to compulsory and binding arbitration before the National Railroad Adjustment Board . . . or before an adjustment board established by the employer and the

unions representing the employees." *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989); *see also* § 3, Second of the RLA. The National Railroad Adjustment Board (or an adjustment board established by the employer and the union) has exclusive jurisdiction over these types of disputes. *Consol. Rail Corp.*, 491 U.S. at 304.

It is clear that, under *Pawlowski* and *Consolidated Rail Corp.*, this Court does not have jurisdiction over plaintiffs' claims and cross-plaintiff's cross-claim because this Court would be called on to interpret the UTU-UP Agreement in order to determine what the "usual manner" of handling the company-level grievance and disciplinary proceedings is.[2] The original disputes between plaintiffs and UP were all minor disputes that could have been conclusively resolved solely by an interpretation and application of the existing UTU-UP Agreement. (*Compl.* ¶¶ 22, 27, 32, 37, 42.) As such, they should have been handled in "[t]he 'usual manner' according to the procedures established by the railroad and the union through the [agreement] rather than by the RLA." *Pawlowski*, 186 F.3d at 1000. Plaintiffs contend that the proceedings at the company-level were not handled in the "usual manner." (*Pls.' Mem.* at 4, 8.) Therefore, this Court has no

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[2] The Court notes that even if it had jurisdiction over plaintiffs' claims (which it does not), plaintiffs may not be able to state a claim upon which relief could be granted. The "usual manner" of handling a grievance is that procedure set forth in the UTU-UP Agreement. Plaintiffs do not challenge the interpretation of the UTU-UP Agreement that does not grant an employee the right to be represented by his minority union. (*Pls.' Mem.* at 4-5.) It is not clear that plaintiffs can concede that the UTU-UP Agreement has been correctly interpreted and applied while claiming that the "usual manner" of handling a grievance has not been followed.

jurisdiction over plaintiffs' claims because it would be called on to interpret and apply the UTU-UP Agreement in order to determine whether the procedures established by UP and UTU through the Agreement were followed and whether the plaintiffs were entitled to be represented by their minority union at the company-level grievance proceeding. *See Consol. Rail Corp.*, 491 U.S. at 303.

The Court notes that the definition of "usual manner" announced in *Pawlowski* does not conflict with the Supreme Court's dicta in *Landers* ensuring minority-union representation to railway employees where minority-union representation has become the "usual manner" for handling company-level proceedings. *Landers*, 485 U.S. at 657 n.4. Under *Pawlowski*, a railway employee would be entitled to minority-union representation at company-level proceedings where the agreement provides for such representation.

Plaintiffs' rely on the Seventh Circuit's decision in *McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968) to support their argument that this Court has jurisdiction over their claims. (*Pls.' Mem.* at 11-12.) Plaintiffs' reliance on *McElroy* is misplaced. In *McElroy* the Seventh Circuit held that it had jurisdiction over the claims of railway employees who "shuttle[d] back and forth between" two crafts because questions about the validity of an agreement under the RLA are properly decided by the courts, rather than by an adjustment board. *Id.* at 967, 970. The court held that the employees had a statutory right under the RLA to choose to have a minority-union represent them for time claims and at disciplinary investigations. *Id.* at 972. Recently, the Seventh Circuit has noted that "the continued validity of the precise holding of *McElroy* is in doubt" in light of the

Supreme Court's decision in *Landers v. National Railroad Passengers* [sic] *Co.*, 485 U.S. 652 (1988). *Pawlowski*, 185 F.3d at 1002 n.4.

In this case, however, this Court is not called on to determine whether the UTU-UP Agreement is valid under the RLA (in which case this Court would have jurisdiction). Rather, plaintiffs' claims and cross-plaintiff's cross-claim would require this Court to determine whether "usual manner" of handling company-level proceedings were complied with (that is, whether the representation provisions in the UTU-UP Agreement were followed). *McElroy* is not applicable in the current matter.

Plaintiffs point to three cases (two of which are unreported) to support their argument that the "usual manner" of handling company-level grievance and disciplinary procedures is not necessarily the manner provided by the UTU-UP Agreement and is instead the "customary practice" of handling company-level proceedings: *Landers v. National Railroad Passenger Corp.*, No. CIV.A.84-467-K (D. Mass. June 24, 1986) ("*Landers I*"), *Landers v. National Railroad Passenger Corp.*, 814 F.2d 41 (1st Cir. 1987) ("*Landers II*"), and *Peters v. National Railroad Passenger Corp.*, No. CIV.A.83-3431, 1988 WL 71944 (D.D.C. June 20, 1988). (*Pls.' Mem.* at 6-8, 14-15.) All of these cases were decided outside of the Seventh Circuit and before the *Pawlowski* decision clarified the meaning of "usual manner" under § 3, First (i) of the RLA. This Court is bound to follow the definition of "usual manner" given in *Pawlowski*, 186 F.3d at 1000.

The court in *Landers I* applied a definition of "usual manner" that was not solely based on the provisions

contained in the agreements. *See Landers I*, No. CIV.A.84-467-K, slip op. at 6. The district court in *Landers I* determined that the practices alleged by the plaintiffs in each case did not rise to the level of "usual manner" under § 3, First (i) of the RLA and dismissed the plaintiff's claim on that basis rather than on jurisdictional grounds. *Id.* The court in *Landers I* noted that "[a]lthough the language of the [RLA] itself does not compel the conclusion that the term 'usual manner' refers to the 'usual manner in which, as a factual matter, a particular carrier and its employees have resolved their disputes,' the parties on both sides assume that this is the proper definition." *Id.* The court in *Landers I* also relied on the Seventh Circuit's opinion in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968) and applied this definition of "usual manner" at least in part "because no indication that any different meaning was intended has been brought to the court's attention." *Id.*

In light of the Seventh Circuit's decisions in *Pawlowski* and *Edwards*, this Court finds the district court's reasoning in *Landers I* unpersuasive and is bound to follow the Seventh Circuit's definition of "usual manner." Both *Pawlowski* and *Edwards* give a clear indication that the "usual manner" means the procedures established by the agreement between the carrier and the union rather than the customary practice of handling disputes.

In the First Circuit's opinion in *Landers II*, the court affirmed the district court's opinion in *Landers I* and seemed to imply that the "usual manner" for handling company-level disciplinary and grievance proceedings may not necessarily be the manner provided in the Agreement. *See Landers II*, 814 F.2d at 47, 49. In *Landers II*, the court noted that "[i]n investigation, conferences or hearings by

or before officers of the carrier an existing legal contract [Agreement] controls." *Id.* at 44. This statement is consistent with the *Edwards* and *Pawlowski* definition of "usual manner" and was in fact cited with approval by the *Pawlowski* court. *See Pawlowski*, 186 F.3d at 1000. Yet the *Landers II* court went on to inquire into "the practices in vogue in the particular workplace" in order to determine what the "usual manner" of handling company-level proceedings was. *Landers II*, 814 F.2d at 47. To the extent that the First Circuit's opinion in *Landers II* can be read as approving of an extra-contractual definition of the "usual manner," this Court will not follow it and instead follow the Seventh Circuit's definition of "usual manner." *See Pawlowski*, 186 F.3d at 1000; *see also Kulavic v. Chicago & Ill. Midland Ry. Co.*, 1 F.3d 507, 513 (7th Cir. 1993); *Edwards v. St. Louis-San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966); *Broady v. Illinois Cent. R.R. Co.*, 191 F.2d 73, 77 (7th Cir. 1951); *Pawlowski v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 31 F. Supp. 2d 1051, 1053 (N.D. Ill. 1998).

In *Peters*, the court also applied a definition of "usual manner" that was not solely based on the provisions contained in the agreement between the carrier and the union. *See Peters*, 1988 WL 71944, at *3. The *Peters* court dismissed the railway employee's claim because the practice alleged did not rise to the level of the "usual manner" under § 3, First (i) of the RLA. *Id.* The *Peters* court relied on the First Circuit's opinion in *Landers II* which applied a definition of the "usual manner" that looked beyond the agreement in place between the carrier and the union. *See id.* For the reasons stated above, this Court does not find the First Circuit's opinion in *Landers*

II persuasive so as to stray from the teachings of *Pawlowski* and *Edwards*.

In sum, § 3, First (i) of the RLA guarantees that a carrier cannot depart from the company-level grievance and disciplinary procedure established by the agreement without violating both the agreement and the RLA. In the current matter, however, since an interpretation of the UTU-UP Agreement is necessary in order to determine whether UP has departed from the UTU-UP Agreement's procedure for handling company-level grievance or disciplinary hearings, this Court does not have jurisdiction over the plaintiffs' claims. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n,* 491 U.S. 299, 303 (1985).[3]

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss plaintiffs' complaint and cross-plaintiff's cross-claim pursuant to Rule 12(b)(1) [docket no. 8-1] is granted. Because the Court dismisses the complaint and cross-claim for lack of subject matter jurisdiction, defendant's

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[3] The Court notes other reasons for dismissing cross-plaintiff's cross-claim. Cross-plaintiff alleges in its cross-claim that "[i]t is incorrect for UP to interpret" the UTU-UP Agreement because "UP conceded that right [to] the UTU in the" UTU-UP Agreement and that UP violated the UTU-UP Agreement when it allowed BLE to progress train service employees' claims at the company-level. (*Cross-pl.'s Cross-cl.* ¶¶ 8-9.) Clearly, this Court does not have jurisdiction over cross-plaintiff's claim because this Court would be required to interpret the UTU-UP Agreement. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989); *see also* § 3, Second of the RLA. For these reasons, in addition to the reasons stated above, the cross-plaintiff's cross-claim must be dismissed for lack of subject matter jurisdiction.

Rule 12(b)(6) motion is denied as moot. This case is hereby terminated.

SO ORDERED

ENTERED: 7/24/01

/s/ Ronald A. Guzman
HON. RONALD A. GUZMAN
United State [sic] **Judge**